IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 13TH MARCH 2007 / 22ND PHALGUNA 1928

WP(C).No. 35444 of 2005(T)

PETITIONER:

N.M. MOHANAN, S/O. NARAYANAN,
AGED 45 YEARS, 41/3350, YASORAM VICTORY TOWER
BANERJI ROAD, ERNAKULAM.

BY ADV. SRI.JOHNSON MANAYANI
SRI.ROY THOMAS.

RESPONDENTS:

1. STATE OF KERALA, REP. BY ITS
SECRETARY, DEPARTMENT OF LOCAL SELF GOVT.,
SECRETARIAT, TRIVANDRUM.

2. CORPORATION OF KOCHI, O/O. COCHIN
CORPORATION, ERNAKULAM, REP. BY ITS SECRETARY.

3. THE TRIBUNAL FOR LOCAL SELF
GOVT.INSTITUTIONS, TRIVANDRUM
REP. BY ITS SECRETARY.

4. SREEDHARA VADHYAR, M/S. YASORAM
CONSTRUCTION COMPANY, ERNAKULAM.

5. SECRETARY, COCHIN CORPORATION
COCHIN, ERNAKULAM.

R1 BY GOVT.PLEADER SRI.K.J.MOHAMMED ANSAR.
R2 & R5 BY ADV. SMT.A.G.ANEETHA, SC, COCHIN CORPN.
R4 BY ADV.SRI.S.R.DAYANANDA PRABHU
SRI.K.S.RAJESH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

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W.P.(C) No.35444 OF 2005

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DATED THIS THE 13TH MARCH, 2007

J U D G M E N T

The petitioner who is running business in resin, sponge, furnishing and furniture clothes under the name and style "Njarekkattu Traders" at Yasoram Victoria Towers, a commercial building complex promoted by the 4th respondent, a builder is aggrieved by Ext.P9 order passed by the Secretary of the Cochin Corporation and by Ext.P11 order passed by the Tribunal for Local Self Government Institutions passed in appeal against Ext.P9. Ext.P1 is copy of the sale deed under which the petitioner purchased shop-room bearing No.41/2825-A(3) in the ground floor of Yasoram Victoria Towers. He submits that his room has access from Banerji Road through the common entrance to the Yasoram Victoria Towers, i.e., through the front western side of the shop-room, and also through the open space purchased by him in the eastern back portion of the shop room. While bulk purchase of goods are made, the petitioner used to store some of the items in the eastern portion. Since eastern portion is an open space and the goods to be stored are perishable goods such as sponge, clothes etc., the petitioner made a temporary roof over the space connecting the eastern compound wall and the eastern outer wall of the shopping

complex building. The abovesaid roof was purely temporary and the objective was only to protect the items stored and the same, the petitioner claims, will not make any sort of inconvenience to anybody. He also points out that he has obtained consent letters from the eastern property owner and the owner of the shopping complex site for the work done. The work, according to him, is so negligible and is not objectionable on any count. He also points out that the shopping complex is having ample open space at the central portion apart from the open space on either sides. But he was served with a provisional order under Section 406(1) of the Kerala Municipality Act by the Corporation and Ext.P2 is copy of that order. To Ext.P2 he submitted Ext.P3 explanations. But even without considering Ext.P3 explanations, the 2nd respondent-Cochin Corporation confirmed the provisional order and issued Ext.P4. The petitioner submits that he has filed an application for regularisation under Rule 143 of the Kerala Municipality Building Rules and Ext.P5 is copy of that application. Since there was no response to Ext.P5 and since demolition threat was imminent, the petitioner preferred Ext.P6 appeal before the 3rd respondent-Tribunal. The petitioner and the original owner of the land preferred Writ Petition before this Court and this Court passed Ext.P7

judgment directing the 3rd respondent-Tribunal to hear the 4th respondent also and take a decision. The Tribunal on 31.3.2005 passed Ext.P8 order quashing the demolition order with a direction to take a fresh decision with respect to the structure within 30 days, after rendering opportunity to the 4th respondent herein, and also to consider the possibility of regularisation of the structure exercising powers under the proviso to Section 406(1)(iii) of the Kerala Municipality Act. On the basis of the hearing conducted pursuant to Ext.P8, the 2nd respondent passed Ext.P9 order declining regularisation and confirming the order of demolition. Against Ext.P9 order, Ext.P10 appeal was preferred before the Tribunal. Ext.P10 appeal was rejected by the Tribunal by Ext.P11 order. The petitioner impugns Ext.P11 as incorrect and illegal. According to him, the regularisation application should have been allowed. The 4th respondent-promoter is the troubleshooter. The petitioner submits that the 3rd respondent-Tribunal has not considered the no-objection certificate issued by the original land-owner and by the adjacent land-owners of the property. Ext.P12, two in number, are those certificates. Impugning Exts.P9 and P11, on various grounds the petitioner pray in the Writ Petition for the following reliefs:-

"i) issue a writ of certiorari or any other appropriate writ, directions or orders quashing Exts.P9 and P11 orders of respondents 2 and 3.

ii) Declare that the petitioner is not liable to remove any portion of his building as per the orders of respondents 2 and 3, Exts.P9 and P11.

iii) Declare that respondent No.2 is liable to regularise the construction made by the petitioner as authorised."

2. A detailed counter affidavit has been filed by the 4th respondent. The 4th respondent submits that the subject matter is an unauthorised construction made by the writ petitioner on the eastern side abutting a commercial building by name Yasoram Victoria Towers which was constructed by M/s.Yasoram Construction Company of which the 4th respondent is the Managing Partner. It was he who obtained approved plan and sanction from the Cochin Corporation for construction of the above multi-storied building. It was on the basis of complaint submitted by him that the Corporation initiated proceedings in respect of the unauthorised construction. It is pointed out that as per the Building Rules, vacant space has to be left on all sides of the

building. But unauthorised construction was made by the petitioner in the vacant space left on the eastern side of the building. The unauthorised construction was put up by him for the purpose of M/s.Ross Pharma who are conducting business in the adjacent building. M/s.Ross Pharma agreed to pay Rs.4 lakhs to the petitioner for the building. The vacant space on the eastern side having a width of 1.98 metres and a length of 17 metres was sold by the land owner to the petitioner as per Ext.P1 sale deed. It is pointed out that the land owner has no power to sell any portion of the area left in compliance with the Building Rules. The building was constructed pursuant to an agreement dated 23.10.1992 between M/s.Yasoram Construction Company and the land owners. As per that agreement, the owners of the land are entitled only for three shop rooms in the second floor having a total plinth area of 900 Sq.feet and 5000 Sq.feet in the remaining portion of the building and proportionate car parking area. The unauthorised construction was made on the area left for common enjoyment by all the owners of the building who have purchased undivided share in the property. Thus the land owner has no right at all to sell or execute sale deed or grant permission for the unauthorised construction. It is clear from Ext.P1 sale deed itself that

the land owners have sold portion of land having 17 metre length and 1.98 metre width which was left for enjoyment of all building-owners including the 4th respondent. Thus Ext.P9 order directing demolition of the unauthorised construction was perfectly justified. Ext.R4(a) is copy of the statement filed by the petitioner before the 2nd respondent. Ext.R4(b) is copy of the agreement dated 23.10.1992 executed by M/s.Yesoram Construction Company and the owners of the land. Ext.R4(c) is the photograph of the unauthorised construction put up by the petitioner on the portion of the building Yasoram Victoria Towers. Ext.R4(d) is copy of the sanctioned building permit and Ext.R4(e) is copy of the rough plan of the building Yasoram Victoria Towers. The counter affidavit then submits that after the construction of the building, the 4th respondent purchased 160 sq.feet in the first floor of the building, 3000 sq.feet in the second floor and 6400 sq.feet in the third floor on the eastern portion of the building M/s. Yasoram Victoria Towers. The unauthorised construction has been made on the eastern portion of the building. The unauthorised construction affects the 4th respondent also seriously in the enjoyment of the building. As per the building rules, the petitioner has no right to make the unauthorised construction on the space left in compliance with the building rules.

Several persons including the 4th respondent have got right over portions of the building. The petitioner is having right over only one room of the entire building. He is not in any way entitled to effect unauthorised constructions within the statutory open space.

3. A reply affidavit has been filed by the petitioner wherein he submits, apart from reiterating his contentions earlier, that the 4th respondent has committed grave violation of the building rules in constructing Victoria Towers. He understands that the 2nd respondent had issued show-cause notice for the same. But due to the influence exerted over respondents 2 and 5, further proceedings were stalled. Exts.R4(d) and R4(e) have no relevance with regard to approval of the Corporation.

4. The petitioner has filed I.A.No.53 of 2006 for a direction to respondents 2 and 5 to inspect the Victoria Towers and to report whether there is any violation of the Building Rules and also whether any proceedings have been initiated against the 4th respondent for such violation. Ext.P13 is copy of the plan of the ground floor of Victoria Towers. Ext.P13 will show the area which is kept as parking area. He alleges that the same has been unauthorisedly converted as a covered PB room, Generator room, Transformer room and Toilet. He

has also produced Ext.P14 photograph to show that the open parking area on the eastern side of the rear side is converted into a locked room. On the basis of Exts.P13 and P14 he contends that it is evident that the approved plan has been clearly violated by the 4th respondent builder. The alleged violations from the side of the petitioner are minimal and trivial as against the violations of the 4th respondent which are grave. The 4th respondent is now attempting to remove "the dust from the eyes of the petitioner while a big log is there in the eyes of the 4th respondent". The reply affidavit contends that in the light of Exts.P13 and P14, the Corporation is to be directed to take action against the 4th respondent, keeping in abeyance implementation of Exts.P9 and P11.

5. The petitioner filed I.A.No.944 of 2006 seeking direction to the Corporation to produce the entire records connected with the Victoria Towers in consonance with Ext.P3 and also the files relating to the issuance of show-cause notice to the 4th respondent for violation of the building rules. Pursuant to that, the files have been produced. A further application, I.A.No.9884 of 2006 has been filed by the petitioner for production of the file relating to the inspection of the 4th respodnent-Yasoram Victoria Towers. In I.A.944 of 2006, this Court

passed an order directing the Corporation Authorities to ensure that an inspection of the entire building in the name "Yasoram Victoria Towers" is conducted by the competent authority under the relevant Rules and a report shall be filed. Pursuant to that order, a report has been submitted and the report is to the effect that in violation of the plan the 4th respondent has constructed generator room and electrical room close to the lift room in the ground floor by closing down the open space having a length of 10.45 metres and width of 4.70 metres. The report further says that in the ground floor itself on the eastern side the existing open space has been converted as a room having a length of 21.10 metre and width of 2 metre (this is with reference to the construction by the petitioner).

6. An additional counter affidavit has been filed by the 4th respondent in the light of the allegations levelled against him. According to that counter affidavit, the builder has not made any serious violation. The generator room, lift room and transformer room are the open area in the ground floor below the building which were covered as a safety measure. If the side wall of the generator room is opened, it would affect the safety of the general public. It is in the interest of all concerned that the above rooms were closed. The

above three rooms were closed as early as in 1997. In the sanctioned plan the three rooms were shown as open area. The alleged violation is only technical in nature and is not a statutory violation. On the other hand, the violation made by the petitioner cannot be regularised.

7. It was very elaborate and fervent submissions which were addressed before me by Sri.Johnson Manayani, counsel for the petitioner. The submissions were resisted very effectively by Sri.S.R.Dayananda Prabhu, counsel for the party respondent. However, the question before me is whether Ext.P11 order of the Tribunal for Local Government Institutions is liable to be corrected in exercise of this Court's extraordinary powers of judicial review under Article 226 of the Constitution of India. I notice from Ext.P11 that the Tribunal has marshalled the facts correctly and has come to its decision on the basis of findings which are based on evidence. Those findings cannot be described by any standards as wholly unreasonable. Having regard to the narrow contours of this Court's powers for judicial review of orders of judicial Tribunals, I do not find any warrant for interfering with Ext.P11. The challenge against Ext.P11 will fail and the Writ Petition will stand dismissed declining the reliefs sought for. However, as regards the violations which have been reported to this

Court as per report dated 7.7.2006 [Ext.R2(a)], even as I dismiss the Writ Petition, there will be a direction to the Secretary of the Corporation of Cochin to issue notice not only to the builder but also to all persons who have acquired ownership over different portions of Victoria Towers including the writ petitioner and the original land owner who was co-appellant before the Tribunal for Local Self Government Institutions and take a decision. It is open to the 4th respondent to file application for regularisation regarding those constructions and decision will be taken by the Secretary of the Corporation on that application also with notice to all the above persons. Decision as directed above will be taken within six months of receiving copy of this judgment.

(PIUS C. KURIAKOSE, JUDGE)

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